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LAW CLERK vs. 11 of 16

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

LAKELAND TRUE VALUE HARDWARE, LLC

Plaintiff / Respondent

vs.

THE HARTFORD FIRE INSURANCE COMPANY

Defendant / Appellant

*Appealed from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Kootenai.*

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Supreme Court Court of Appeals
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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
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CLERK DISTRICT COURT
Brian Crump
DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE,
L.L.C.,

Plaintiff,

vs.

THE HARTFORD FIRE INSURANCE
COMPANY, a Connecticut corporation,

Defendant.

Case No. CV-08-7069

**DEFENDANT'S VERIFIED
MEMORANDUM OF COSTS**

COMES NOW defendant Hartford Fire Insurance Company ("Hartford"), by and through its counsel of record, Hall, Farley, Oberrecht & Blanton P.A., and submits this Verified Memorandum of Costs. This Memorandum is supported by the Affidavit of Counsel in Support of Defendant's Verified Memorandum of Costs ("Counsel Aff."), and the Affidavit of Melanie Copley in Support of Defendant's Verified Memorandum of Costs ("Copley Aff.") filed contemporaneously herewith. This Memorandum is filed pursuant to Idaho Rule of Civil Procedure 54(d)(5).

I. PROCEDURAL BACKGROUND

Lakeland initially filed this action on September 4, 2008. An Amended Complaint was filed on September 15, 2008, alleging claims for breach of contract and bad faith.

On August 31, 2009, Hartford served upon Lakeland a Rule 68 Offer of Judgment in the amount of \$100,000. Counsel Aff, Exh. A. This Offer of Judgment was not accepted by Lakeland within the 14 days allowed under IRCP 68. *Id.* at ¶2.

On November 23, 2009, this Court issued its Order Granting Defendant's Motion to Compel and Order Granting Defendant's Summary Judgment in Part and Denying Summary Judgment in Part, which dismissed Lakeland's bad faith claim, but denying summary judgment "with respect to plaintiff's claim for breach of contract as relating to Hartford's determination of the dates of the 'Period of Restoration' at issue in this matter."

Plaintiff subsequently moved for reconsideration of the Court's summary judgment decision on December 15, 2009, which request was denied by the Court. *See* Order Denying Plaintiff's Motion for Reconsideration, filed April 16, 2010.

The Court then struck plaintiff's designations of two experts, Robert Underdown and Drew Lucurell. *See* Order Granting in Part and Denying in Part Defendant's Motion to Strike Plaintiff's Experts and Memorandum in Support, filed January 25, 2010.

Plaintiff thereafter moved for reconsideration a second time, on February 4, 2010, which, again, was denied by the Court. *See* Order Denying Plaintiff's Second Motion for Reconsideration, filed February 26, 2010.

In conjunction therewith, the Court also denied plaintiff's motion to amend its complaint to add a claim for punitive damages. *See* Order Denying Plaintiff's Motion to Amend Complaint, filed February 26, 2010.

Thereafter, the Court ruled that plaintiff could not claim consequential damages, and

dramatically limited the scope of testimony by plaintiff's accounting expert, Dan Harper. *See* Memorandum Decision and Order Re: Hartford's Motions in Limine, filed March 8, 2010.

Plaintiff then sought reconsideration of the Court's ruling on the scope of Mr. Harper's testimony, which the Court granted on a limited basis, restricting Mr. Harper's testimony to allow him to only testify that "plaintiff's damages in this action total no more than \$19,052, which amount will be subject to cross-examination by defendant at the time of trial." *See* Order Re: Plaintiff's Motion for Reconsider, filed March 13, 2010.

The trial date was subsequently moved from an April 19, 2010 setting, at plaintiff's request, to a new trial date of May 24, 2010. *See* Order Re: Plaintiff's Motion to Continue Trial, filed April 12, 2010.

Thereafter, the Court again denied yet another motion for reconsideration of its summary judgment decision by plaintiff, also rebuffing plaintiff's efforts to consolidate this action with a separate, unserved action against Hartford by the Lakeland employees. *See* Memorandum Decision and Order Re: Lakeland True Value Hardware's Motion to Reconsider and Motion to Consolidate, filed May 17, 2010. Plaintiff was also sanctioned for its attempts at such consolidation. *Id.*

On May 25, 2010, trial in this matter subsequently commenced. On May 28, 2010, the jury rendered a total defense verdict in favor of defendant Hartford.

II. COSTS

A. Hartford is the prevailing party, and is entitled to costs pursuant to IRCP 54(d)(1).

In making a decision regarding any award of costs or attorney's fees, the Court must first consider and determine whether there exists a prevailing party. I.R.C.P. 54(d)(1). Idaho Rule of Civil Procedure 54(d)(1)(B) defines a "Prevailing Party" as follows:

In determining which party to an action is a prevailing party and entitled to costs,

the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

The determination of whether there is a prevailing party for purposes of an award of costs, and if so, to what extent, is committed to the sound discretion of the trial court. *Polk v. Larrabee*, 135 Idaho 303, 17 P.3d 247, 256 (2000); *Adams v. Krueger*, 124 Idaho 97, 856 P.2d 864, 867 (1993); *Cunningham v. Waford*, 131 Idaho 841, 965 P.2d 201, 205-206 (Ct. App. 1998). The three principal factors to be considered when determining which party, if any, prevailed in a matter are as follows: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. *Nguyen v. Bui*, 146 Idaho 187, 192, 191 P.3d 1107, 1112 (Ct. App. 2008); *Sanders v. Lankford*, 134 Idaho 322, 1 P.3d 823, 826 (Ct. App. 2000); *Chadderdon v. King*, 104 Idaho 406, 411-12, 659 P.2d 160, 165-66 (Ct. App. 1983)). A party may be the prevailing party for purposes of an award of attorney fees and/or costs where it prevails on the “main issue of the case which consumed the majority of the trial.” *Chadderdon*, 104 Idaho at 411-12, 659 P.2d at 165-66 (finding that defendant should be awarded costs as prevailing party and a proportionate share of his claim for attorney fees). An application of these principles and factors establishes that, in this case, Hartford was unequivocally the prevailing party to whom costs should be awarded.

First, of the two causes of action alleged by Lakeland against Hartford, Lakeland obtained no relief on either cause of action. Lakeland’s bad faith claim was dismissed on summary judgment, and Lakeland’s breach of contract claim was rejected by a jury at trial. In short, Lakeland was granted no relief on its causes of action against Hartford.

Second, as with the above, there were multiple claims: breach of contract and bad faith.

Again, Lakeland failed to prevail on either cause of action.

Third, again, Lakeland prevailed on none of its claims against Hartford; Hartford, on the other hand, prevailed on both claims made by Lakeland against it.

Accordingly, the prevailing party analysis in this matter is very straightforward – Hartford has prevailed at all turns in this litigation, and Lakeland’s claims have been rejected both by this Court and by a jury. As such, Hartford should be deemed the prevailing party for the purposes of Rule 54(d), and should be awarded both its costs as a matter of right (IRCP 54(d)(1)(C)) and its discretionary costs (IRCP 54(d)(1)(D)).

B. Hartford is also entitled to costs pursuant to IRCP 68

In addition to an award of costs as prevailing party under IRCP 54(d), Hartford is also entitled to an award of costs pursuant to IRCP 68, in light of Hartford’s Rule 68 Offer of Judgment, served upon Lakeland on August 31, 2009 (Counsel Aff., Exh. A), in the amount of \$100,000. At that juncture, all Business Income amounts and Business Personal Property amounts (including amounts due to Klein’s) had been paid to Lakeland.¹ See Affidavit of Melanie Copley in Support of Hartford’s Motion for Summary Judgment, filed August 20, 2009, at ¶2. Moreover, Hartford understood that plaintiff’s fees and costs, at least as of early June, stood at approximately \$35,000. Thus, Hartford’s Rule 68 offer of judgment was reasonable, especially in light of the fact that the maximum amount plaintiff could have prevailed on at the time of trial was only \$19,052.

¹ However, there was one later additional \$43,074.00 Business Personal Property payment made on March 1, 2010. This additional payment was made necessary as the result of omitted information identified by plaintiff’s expert Dan Harper in a “Missing Items” report created by Mr. Fritz in May 2009, upon which Hartford had, in part, based its Business Personal Property payments. See Plaintiffs’ 28 Day Supplemental Expert Witness Disclosure, filed February 23, 2010, at February 22, 2010 report, p. 13 & Tab 6, and Affidavit of Melanie Copley in Support of Hartford’s Motion for Summary Judgment, filed August 20, 2009, at ¶7. Thus, as of August 31, 2009, this amount was not at issue in the litigation, as Mr. Fritz had not claimed this additional amount, and had not otherwise objected that the Business Personal Property calculation at that point was incorrect. When identified by plaintiff’s expert the following February, the additional amount was promptly paid by Hartford.

Ultimately, then, a comparison of the Rule 68 offer versus plaintiff's recovery is a simple matter – plaintiff was offered \$100,000, but recovered neither an award from the jury, nor is entitled to any award of fees and costs as a prevailing party under Rule 54. Thus, clearly, Hartford is entitled to a recovery of its costs under Rule 68 made after the offer.

While the costs claimed under such a Rule 68 cost award would, here, be redundant of certain costs already awardable to Hartford under Rule 54 by virtue of its status as prevailing party, this Court is empowered to consider the Rule 68 offer in determination of prevailing party status to bolster such a finding of prevailing party status. See Crump v. Bromley, 148 Idaho 172, ___, 219 P.3d 1188, 1191 (2009) (“We did caution that offers of judgment ‘should not be the only, or even most significant, factor in the trial court’s prevailing party analysis,’ but they may be considered.”)(citing Zenner v. Holcomb, 147 Idaho 444, 210 P.3d 552 (2009)). This also furthers the ends of the stated purpose of Rule 68: “This rule is designed to encourage settlement and to avoid the expense and time of unnecessary trials.” Gilbert v. City of Caldwell, 112 Idaho 386, 398, 732 P.2d 355, 368 (Ct. App. 1987).

Thus, in the present case, based on plaintiff's rejection of Hartford's reasonable rule 68 offer of judgment, Hartford should, again, found to be the prevailing party, and entitled to the recover of its costs (both costs-by-right and discretionary costs) under IRCP 54(d)(1).

C. Hartford's claimed costs as a matter of right (IRCP 54(d)(1)(C)).

Hartford requests the following costs as a matter of right, pursuant to Idaho Rule of Civil Procedure 54(d)(1)(C):

- | | | |
|----|---|----------------|
| 1) | <u>Filing Fees</u> (I.R.C.P. 54(d)(1)(C)(1)) ² - | <u>\$58.00</u> |
| 2) | <u>Service Fees</u> (IRCP 54(d)(1)(C)(2)) - | <u>\$0.00</u> |
| 3) | <u>Witness Fees</u> (IRCP 54(d)(1)(C)(3)) - | |

² Counsel Aff., Exh. B, p. 4.

Steve Bonanno, May 27, 2010 (trial) ³	\$20.00
Amy Kohler, May 27, 2010 (trial) ⁴	\$20.00
Brian Alm, Feb. 9, 2010 (depo) ⁵	\$20.00
Amy Kohler, Sept. 21, 2009 (depo) ⁶	\$20.00
Julia Kale, March 1, 2010 (depo) ⁷	\$20.00
Julia Kale, May 19, 2010 (trial depo) ⁸	\$20.00

<u>Total</u>	<u>\$120.00</u>
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4) Trial Witness Travel Expenses (IRCP 54(d)(1)(C)(4))⁹ –

Steve Bonanno, Careywood (Athol), ID – 26 miles	\$7.80
Amy Kohler, Bothell, WA – 318 miles	\$95.40

<u>Total</u>	<u>\$103.20</u>
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5) Certification Expenses (IRCP 54(d)(1)(C)(5)) - \$0.00

6) Costs of exhibits (I.R.C.P. 54(d)(1)(C)(6))¹⁰ -

Affidavit of Counsel, filed Jan. 7, 2009 (25 pgs)	\$2.50
Affidavit of Counsel, filed Jan. 20, 2009 (86 pgs)	\$8.60
Affidavit of Brian Alm, filed Jan. 20, 2009 (2 pgs)	\$2.00
Affidavit of Counsel, filed Aug. 18, 2009 (1,142 pgs)	\$114.20
Affidavit of Melanie Copley, filed August 18, 2009 (280 pgs)	\$28.00
Affidavit of Counsel, filed Oct. 21, 2009 (46 pgs)	\$4.60
Affidavit of Counsel, filed Nov. 25, 2009 (1 pg)	\$0.10
Affidavit of Counsel, filed Dec. 29, 2009 (11 pgs)	\$1.10
Affidavit of Counsel, filed Dec. 29, 2009 (24 pgs)	\$2.40
Affidavit of Counsel, filed Dec. 29, 2009 (7 pgs)	\$0.70
Affidavit of Counsel, filed Dec. 29, 2009 (58 pgs)	\$5.80
Affidavit of Counsel, filed Jan. 6, 2010 (58 pgs)	\$5.80
Affidavit of Counsel, filed Feb. 8, 2010 (123 pgs)	\$12.30
Affidavit of Counsel, filed Feb. 8, 2010 (78 pgs)	\$7.80
Affidavit of Counsel, filed Feb. 16, 2010 (5 pgs)	\$0.50
Affidavit of Counsel, filed April 12, 2010 (3 pgs)	\$0.30

³ Copley Aff., Exh. A.

⁴ Copley Aff., Exh. B.

⁵ Counsel Aff., Exh. B, p. 5; Exh. C.

⁶ Counsel Aff., Exh. B, p. 5; Exh. D. Although denoted only as “deposition preparation,” this amount includes deposition attendance time, as well.

⁷ Counsel Aff., Exh. B, p. 6; Exh. E.

⁸ *Id.* Although denoted only as “travel expenses,” this amount includes deposition attendance time, as well.

⁹ Calculated using MapQuest, using witnesses’ home addresses and the address of the Courthouse. The witnesses’ home addresses are not reflected in this public filing as a matter of privacy concerns, but will be provided to the Court and plaintiff’s counsel upon request, as needed.

¹⁰ At the rate of .10/pg (Counsel Aff., Exh. B).

Affidavit of Counsel, filed May 17, 2010 (37 pgs)	\$3.70
Affidavit of Counsel, filed May 19, 2010 (18 pgs)	\$1.80
Defendant's Trial Exhibit ¹¹ 1001 (111 pgs x 2)	\$22.20
Defendant's Trial Exhibit 1003 (25 pgs x 2)	\$5.00
Defendant's Trial Exhibit 1004 (55 pgs x 2)	\$11.00
Defendant's Trial Exhibit 1005 (72 pgs x 2)	\$14.40
Defendant's Trial Exhibit 1006 (28 pgs x 2)	\$5.60
Defendant's Trial Exhibit 1007 (6 pgs x 2)	\$1.20
Defendant's Trial Exhibit 1008 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1013 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1014 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1018 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1026A (3 pgs x 3)	\$0.60
Defendant's Trial Exhibit 1027 (7 pgs x 2)	\$1.40
Defendant's Trial Exhibit 1028 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1030 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1032 (9 pgs x 2)	\$1.80
Defendant's Trial Exhibit 1034 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1035 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1036 (92 pgs x 2)	\$18.40
Defendant's Trial Exhibit 1038 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1041 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1042 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1043 (9 pgs x 2)	\$1.80
Defendant's Trial Exhibit 1047 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1048 (8 pgs x 2)	\$1.60
Defendant's Trial Exhibit 1050 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1051 (7 pgs x 2)	\$1.40
Defendant's Trial Exhibit 1052 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1053 (9 pgs x 2)	\$1.80
Defendant's Trial Exhibit 1054 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1055 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1056 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1057 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1061 (4 pgs x 2)	\$0.80
Defendant's Trial Exhibit 1062 (22 pgs x 2)	\$4.40
Defendant's Trial Exhibit 1063 (4 pgs x 2)	\$0.80
Defendant's Trial Exhibit 1065 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1066 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1067 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1068 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1069 (3 pgs x 2)	\$0.60

¹¹ Per the Court's Scheduling Order, Notice of Trial Setting and Initial Pretrial Order, filed June 22, 2009, at ¶7, Hartford was required to provide 2 copies of exhibits at the time of trial, a Clerk's Original and a judge's copy; accordingly, Hartford's calculation of trial exhibit page length reflects these two required copies. As an aside, Hartford provided copies of the trial exhibits to Lakeland's counsel via electronic copy.

Defendant's Trial Exhibit 1070 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1073 (7 pgs x 2)	\$1.40
Defendant's Trial Exhibit 1075 (11 pgs x 2)	\$2.20
Defendant's Trial Exhibit 1076 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1079 (4 pgs x 2)	\$0.80
Defendant's Trial Exhibit 1080 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1101 (9 pgs x 2)	\$1.80
Defendant's Trial Exhibit 1104 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1126 (4 pgs x 2)	\$0.80
Defendant's Trial Exhibit 1127 (7 pgs x 2)	\$1.40
Defendant's Trial Exhibit 1128 (9 pgs x 2)	\$1.80
Defendant's Trial Exhibit 1129 (27 pgs x 2)	\$5.40
<u>Total</u>	<u>\$322.80</u>
7) <u>Bond Premiums</u> (I.R.C.P. 54(d)(1)(C)(7)) -	<u>\$0.00</u>
8) <u>Testifying Expert Fees</u> (I.R.C.P. 54(d)(1)(C)(8)) -	
Dan Harper, Feb. 2, 2010 (plaintiff's expert) ¹²	<u>\$2,000.00</u>
9) <u>Deposition Reporting Costs</u> (I.R.C.P. 54(d)(1)(C)(9))	
Mike Fritz, Jan. 22, 2009 ¹³ -	\$1,784.50
Videographer ¹⁴ -	\$808.54
Mike/Kathy Fritz, Jan 23, 2009 ¹⁵ -	\$1,695.75
Videographer ¹⁶ -	\$775.00
Amy Kohler, Sept. 21, 2009 ¹⁷ -	\$204.25
Dan Harper, Feb. 2, 2010 ¹⁸ -	\$1,185.50
Brian Alm, Feb. 9, 2010 ¹⁹ -	\$1,246.00
Julia Kale, May 19, 2010 ²⁰ -	\$2,462.20
Videographer ²¹ -	\$870.00
<u>Total</u>	<u>\$11,031.74</u>
10) <u>Deposition Copy Costs</u> (I.R.C.P. 54(d)(1)(C)(10))	

¹² Counsel Aff., Exh. B, p. 6; Exh. F.

¹³ Counsel Aff., Exh. B, p. 4 & Exh. G.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at Exh. B, p. 5 & Exh. G.

¹⁸ *Id.* at Exh. B, p. 6, & Exh. G.

¹⁹ *Id.* at Exh. B, p. 5 & Exh. G.

²⁰ *Id.* at Exh. B, p. 6 & Exh. G.

²¹ *Id.*

Julia Kale, March 1, 2010 ²² -	\$638.34
Video-DVD ²³	\$150.00
Melanie Copley, March 1, 2010 ²⁴ -	\$270.20
Michelle Reynolds, March 1, 2010 ²⁵ -	\$486.80
Video-DVD ²⁶	\$75.00
<u>Total</u>	<u>\$1,620.34</u>

TOTAL CLAIMED COSTS AS A MATTER OF RIGHT: \$15,256.08

D. Hartford's claimed discretionary costs (IRCP 54(d)(1)(D)).

Idaho Rule of Civil Procedure 54(d)(1)(D) provides “[a]dditional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party.” I.R.C.P. 54(d)(1)(D).

1. Applicable Law.

The determination of whether to award costs pursuant to Idaho Rule of Civil Procedure 54(d)(1)(D) is a matter of discretion with the trial court. *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996). However, the Court has explained that in ruling on a motion for discretionary costs pursuant to Rule 54(d)(1)(D), “[t]he trial court must make express findings as to why a party’s discretionary costs should or should not be allowed” and that “[e]xpress findings as to the general character of requested costs and whether such costs are necessary, reasonable, exceptional, and in the interests of justice is sufficient to comply with this requirement.” *Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 167 (2005).

The Court has provided that a trial court has broad latitude in determining what type of costs are “exceptional” under Rule 54(d)(1)(D). In *Hayden Lake*, the Court stated that “[t]his

²² Counsel Aff., Exh. B, p. 2; Exh. H.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

Court has always construed the requirement that costs be 'exceptional' under I.R.C.P. 54(d)(1)(D) to include those costs incurred because the nature of the case was itself exceptional." *Hayden Lake*, 141 Idaho at 314, 109 P.3d at 167; *see also Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 475, 36 P.3d 218, 227 (2001) (specifically noting that discretionary costs including expert witness fees were "exceptional given the magnitude and nature of the case"). Thus, under *Hayden Lake*, a Court may award discretionary costs based on a finding that "the nature of the case was itself exceptional." *Hayden Lake*, 141 Idaho at 314, 109 P.3d at 167. Conversely, in *City of McCall v. Seubert*, 142 Idaho 580, 130 P.3d 1118 (2006), the Court stated that "[a] court may evaluate whether costs are exceptional within the context of the nature of case." *Id.* at 588, 130 P.3d at 1126. Thus, in light of *Hayden Lake* and *McCall*, a trial court may award discretionary costs based on either a determination that "the nature of the case itself was exceptional," *Hayden Lake*, 141 Idaho at 314, 109 P.3d at 167, or that the costs "are exceptional within the context of the nature of the case," *Seubert*, 142 Idaho at 588, 130 P.3d at 1126.

For example, in *Great Plains Equipment*, the Court held that the district court had properly awarded discretionary costs to the prevailing party for items such as photocopying, travel, exhibit preparation and expert witness fees on the grounds that such costs were reasonable, necessary and exceptional "given the complexity and nature of the case." 136 Idaho at 474-75, 36 P.3d at 226-27. Similarly, in *Richard J. and Esther E. Wooley Trust v. Debest Plumbing, Inc.*, 133 Idaho 180, 983 P.2d 834 (1999), the Supreme Court of Idaho upheld the trial court's award of discretionary costs, including costs for experts over and above the amount allowed as a matter of right as well as travel expenses for attorneys travel to depositions, in a negligence action. *Id.* at 136 Idaho at 186-187, 983 P.2d at 840-841. Likewise, in *Puckett v.*

Verska, 144 Idaho 161, 158 P.3d 937 (2007), the plaintiff recovered damages from the defendant in a medical malpractice action. The trial court awarded the plaintiff \$120,714.85 in discretionary costs, which included the entirety of plaintiff's expert fees in excess of amounts allowed as a matter of right and travel expenses. *Id.* at 161, 158 P.3d at 945.

In the instant action, it is clear that the discretionary costs outlined below were necessary and reasonably incurred in light of the claims advanced by plaintiff and plaintiff's litigation conduct. Furthermore, such costs were not only "exceptional" individually, but were exceptional as a whole considering the nature of the dispute (a disagreement over 3 months of Business Income coverage, resulting in \$19,052 in dispute, which litigation was initiated during the course of the claims process in lieu of submitting requested claim information or otherwise fully cooperating), the extremely high amount of damages alleged as compared to the relief received (especially in light of plaintiff's rejection of Hartford's Rule 68 offer), plaintiff's ongoing attempts to include a claim for bad faith despite dismissal of such a claim in November 2009 by the Court, the claims made by Lakeland as regarded the entirety of the claims process rather than the actual 3 months of disputed Business Income which was the actual issue to be determined at the time of trial, as well as the scattered locations of the various witnesses and experts in this matter (Coeur d'Alene, Idaho; Spokane, Washington; Bothell, Washington; Boise, Idaho; Charlotte, North Carolina). Thus, in the interests of justice, Hartford should be awarded its discretionary costs incurred in this matter, as are outlined below.

2. Claimed discretionary costs.

a. Expert fees and related costs.

In the present case, plaintiff retained an accounting expert, Dan Harper, to provide testimony regarding the scope of plaintiff's claimed damages, as well as other inadmissible

components of testimony, including compliance with insurance claim reporting requirements and consequential damages. Despite this Court's dismissal of plaintiff's bad faith claim on November 23, 2009, via its Order Granting Defendant's Motion to Compel and Order Granting Defendant's Summary Judgment in Part and Denying Summary Judgment in Part, plaintiff continued to assert a right to a bad faith claim through multiple reconsideration filings, including at least one late effort to also have the Court reconsider its ruling on consequential damages by expansion of the contract-defined Period of Restoration. *See* Memorandum Decision and Order Re: Lakeland True Value Hardware's Motion to Reconsider and Motion to Consolidate, filed May 17, 2010, at pp. 9-11. As a result, Hartford was required to take the exceptional step of utilizing an accounting expert not only to examine plaintiff's claim for \$19,052 in additional Business Income identified by Mr. Harper, but also the various other consequential and bad faith-type damages asserted by Mr. Harper. *See generally* Plaintiffs' 28 Day Supplemental Expert Witness Disclosure, filed February 23, 2010, at February 22, 2010 report and all tabs thereto. Although this expert witness (Dennis Reinstein) did not ultimately testify at the time of trial, Mr. Reinstein was identified as a testifying witness in advance of trial, and did attend trial to observe Mr. Harper's testimony, to identify any potential portions of Mr. Harper's testimony that might necessitate the calling of Mr. Reinstein to rebut contentions made by Mr. Harper. Moreover, the total cost incurred by Hartford's expert on these points is reasonable, given that the total cost incurred by Hartford's expert, Mr. Reinstein, was \$28,746.96, approximately half of the total bill of plaintiff's own expert incurred even through the beginning of March 2010 (\$54,897.42, per Plaintiff's Proposed Trial Exhibit No. 27, *see* Counsel Aff., Exh. W).

Further, the \$2,000 permitted as a cost-by-right for Mr. Harper's billed deposition time paid by Hartford is inadequate to cover the entire amount billed by Mr. Harper, which actually

totaled \$3,128.69. Accordingly, Hartford should be allowed the balance of Mr. Harper's deposition billing - \$1,128.69 – in addition to the amount recoverable as a cost-by-right, given the exceptional nature of Mr. Harper's billed time.

Finally, plaintiff also retained a bad faith expert, Robert Underdown, who was later excluded by the Court by virtue of his late disclosure and the Court's dismissal of plaintiff's bad faith claim. Plaintiff's identification of Mr. Underdown required Hartford to conduct expert research on a potential bad faith expert for itself, John Bates, in the form of IDEX searches, an exceptional step in light of the ultimate lack of offered testimony by Mr. Underdown. Research was also conducted on Mr. Harper.

Accordingly, Hartford claims the following exceptional, reasonable, and necessary expert fees and related costs as discretionary costs which should be awarded in the interests of justice:

Dennis Reinstein -	
Sept. 30, 2009 ²⁷	\$2,150.00
March 31, 2010 ²⁸	\$4,577.50
June 3, 2010 ²⁹	\$22,019.46
Expert research services (IDEX)	
Nov. 2, 2009 ³⁰	\$90.00
Feb. 1, 2010 ³¹	\$251.00
Dan Harper ³²	\$1,128.69
<u>Total</u>	<u>\$30,216.65</u>

b. Trial exhibits not admitted.

Hartford has claimed, above, the costs of admitted trial exhibits as costs-by-right.

²⁷ Counsel Aff., Exh. B, p. 4; Exh. I.

²⁸ Copley Aff., Exh. C.

²⁹ Counsel Aff., Exh. I. This amount represent's Mr. Reinstein's final invoice, the payment for which is currently being processed.

³⁰ *Id.*; Exh. J.

³¹ *Id.* at p.5; Exh. J.

³² *Id.* at p. 6; Exh. F. This amount reflects a deduction of \$2,000 which has already been claimed as a cost-by-right, above.

However, Hartford also reasonably and necessarily expended additional costs in preparing trial exhibits in this matter which were not otherwise admitted at the time of trial. As the prevailing party, and in light of Lakeland's rejection of Hartford's Rule 68 offer, the necessary creation of such exhibits spanning the breadth of the claim to address plaintiff's multiple arguments was exceptional, and Hartford should be awarded the remaining necessary and reasonable trial exhibit costs as a discretionary amount in the interests of justice:

Defendant's Trial Exhibit ³³ 1002 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1009 (23 pgs x 2)	\$4.60
Defendant's Trial Exhibit 1010 (34 pgs x 2)	\$6.80
Defendant's Trial Exhibit 1011 (16 pgs x 2)	\$3.20
Defendant's Trial Exhibit 1012 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1015 (6 pgs x 2)	\$1.20
Defendant's Trial Exhibit 1016 (5 pgs x 2)	\$1.00
Defendant's Trial Exhibit 1017 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1019 (1 pgs x. 2)	\$0.20
Defendant's Trial Exhibit 1020 (15 pgs x 2)	\$3.00
Defendant's Trial Exhibit 1021 (27 pgs x 2)	\$5.40
Defendant's Trial Exhibit 1022 (30 pgs x 2)	\$6.00
Defendant's Trial Exhibit 1023 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1024 (28 pgs x 2)	\$5.60
Defendant's Trial Exhibit 1025 (13 pgs x 2)	\$2.60
Defendant's Trial Exhibit 1026 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1029 (7 pgs x. 2)	\$1.40
Defendant's Trial Exhibit 1031 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1033 (5 pgs x 2)	\$1.00
Defendant's Trial Exhibit 1037 (13 pgs x 2)	\$2.60
Defendant's Trial Exhibit 1039 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1040 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1044 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1045 (18 pgs x 2)	\$3.60
Defendant's Trial Exhibit 1046 (18 pgs x 2)	\$3.60
Defendant's Trial Exhibit 1049 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1058 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1059 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1060 (4 pgs x 2)	\$0.80
Defendant's Trial Exhibit 1063A (1 pg x 2)	\$0.20

³³ Per the Court's Scheduling Order, Notice of Trial Setting and Initial Pretrial Order, filed June 22, 2009, at ¶7, Hartford was required to provide 2 copies of exhibits at the time of trial, a Clerk's Original and a judge's copy; accordingly, Hartford's calculation of trial exhibit page length reflects these two required copies. As an aside, Hartford provided copies of the trial exhibits to Lakeland's counsel via electronic copy.

Defendant's Trial Exhibit 1064 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1071 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1072 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1074 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1077 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1078 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1081 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1082 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1083 ³⁴ (897 pgs x 2)	\$175.80
Defendant's Trial Exhibit 1083A (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1084 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1085 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1086 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1086A (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1087 (126 pgs x 2)	\$25.20
Defendant's Trial Exhibit 1088 (14 pgs x 2)	\$2.80
Defendant's Trial Exhibit 1089 (59 pgs x 2)	\$11.80
Defendant's Trial Exhibit 1090 (16 pgs x 2)	\$3.20
Defendant's Trial Exhibit 1091 (77 pgs x 2)	\$15.40
Defendant's Trial Exhibit 1092 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1093 (6 pgs x 2)	\$1.20
Defendant's Trial Exhibit 1094 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1095 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1096 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1096A (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1097 (14 pgs x 2)	\$2.80
Defendant's Trial Exhibit 1098 (1040 pgs x 2)	\$208.00
Defendant's Trial Exhibit 1099 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1100 (7 pgs x 2)	\$1.40
Defendant's Trial Exhibit 1102 (10 pgs x 2)	\$2.00
Defendant's Trial Exhibit 1103 (8 pgs x 2)	\$1.60
Defendant's Trial Exhibit 1105 (14 pgs x 2)	\$2.80
Defendant's Trial Exhibit 1106 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1106A (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1107 (2 pg x 2)	\$0.40
Defendant's Trial Exhibit 1108 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1109 (84 pgs x 2)	\$16.80
Defendant's Trial Exhibit 1110 (7 pgs x 2)	\$1.40
Defendant's Trial Exhibit 1111 (11 pgs x 2)	\$2.20
Defendant's Trial Exhibit 1112 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1113 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1114 (35 pgs x 2)	\$7.00
Defendant's Trial Exhibit 1115 (11 pgs x 2)	\$2.20

³⁴ Exhibits 1128 and 1129 were admitted and claimed above as costs-by-right, and were extracted from Exhibit 1083. Those 36 pages extracted to make Exhibits 1128 and 1129 are deducted from the page count for Exhibit 1083.

Defendant's Trial Exhibit 1116 (1 pg x 2)	\$0.20
Defendant's Trial Exhibit 1117 (10 pgs x 2)	\$2.00
Defendant's Trial Exhibit 1118 (10 pgs x 2)	\$2.00
Defendant's Trial Exhibit 1119 (11 pgs x 2)	\$2.20
Defendant's Trial Exhibit 1120 (4 pgs x 2)	\$0.80
Defendant's Trial Exhibit 1120A (5 pgs x 2)	\$1.00
Defendant's Trial Exhibit 1121 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1122 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1123 (3 pgs x 2)	\$0.60
Defendant's Trial Exhibit 1124 (2 pgs x 2)	\$0.40
Defendant's Trial Exhibit 1125 (1 pg x 2)	\$0.20
<u>Total</u>	<u>\$560.00</u>

c. Copying, messengers, FedEx, electronic, and similar costs.

Additionally, Hartford reasonably and necessarily incurred document preparation, copying, telefax, electronic, and messenger service costs in defending this action, which were exceptional in light of the document-intensive nature of the case, the repeated motions filed by the plaintiff, and the unnecessary need for trial. As such, Hartford requests discretionary costs on these items be awarded in the interests of justice as follows:

1.	<u>CD copies</u> ³⁵	\$20.00
2.	<u>Messengers</u> ³⁶	\$35.00
3.	<u>Telecopies</u> ³⁷	\$6.50
4.	<u>Photocopies</u> ³⁸	\$7,929.70
5.	<u>Scanned copies</u> ³⁹	\$34.70
6.	<u>FedEx</u> ⁴⁰	\$1,927.02
7.	<u>Copy of store floor plan</u> ⁴¹	\$3.18

³⁵ Counsel Aff., Exh. B, p. 1.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*, pp. 1-2. This total subtracts the \$620.30 in trial exhibit costs claimed as costs-by-right and as a separate discretionary item, above.

³⁹ *Id.*, at p. 2.

⁴⁰ *Id.*, at pp. 2-4.

8.	<u>Copy of unserved employee suit</u> ⁴²	\$6.95
9.	<u>Video deposition synchronization</u> ⁴³	\$105.00
10.	<u>Certified mailing</u> ⁴⁴	\$5.54
	<u>Total</u>	<u>\$10,073.59</u>

d. Mediation costs.

Per the Court's Scheduling Order, Notice of Trial Setting and Initial Pretrial Order, filed June 22, 2009, at p. 7, the parties were "encouraged and expected to mediate as soon as possible." The parties did so, utilizing Merlyn Clark from Hawley, Troxell, Ennis & Hawley, LLP of Boise, Idaho. However, no settlement was reached. Hartford subsequently served a Rule 68 offer of judgment on August 13, 2009 (Counsel Aff., Exh. A) in the amount of \$100,000, which was not accepted by the plaintiff. In light of Hartford's exceptional efforts to mediate and resolve this matter short of trial, Hartford should be awarded its reasonable and necessary portion of the mediation costs in the interests of justice, which were paid in two payments of \$3,006.10 and \$291.96, for a total of \$3,298.06.⁴⁵

e. Additional witness costs.

Hartford has claimed certain witness attendance and travel costs as costs-by-right, *supra*. However, the amounts claimed do not reflect the exceptional amounts actually incurred and paid by Hartford in compensating certain individuals, who are not current employees of Hartford or Sedgwick, for their time taken from work to prepare for and provide their testimony at deposition and trial in this matter, and travel therefor. In particular, these costs were incurred reimbursing Amy Kohler (formerly of MD&D), Julia Kale (formerly of Sedgwick), Brian Alm (Klein's), and

⁴¹ *Id.*, at p. 4.

⁴² *Id.*, at p. 5.

⁴³ *Id.* at p. 6.

⁴⁴ *Id.* at p. 5.

⁴⁵ Counsel Aff., Exh. B, p. 4; Exh. K.

Steve Bonanno (GAB Robins) for their deposition and trial testimony preparation and attendance time and expenses. These necessary and reasonable amounts total which should be awarded in the interests of justice are as follows:

Amy Kohler	
Nov. 6, 2009 (related to her Sept. 21, 2009 depo) ⁴⁶	\$1,000.00
Mar. 22, 2010 (trial testimony prep) ⁴⁷	\$1,020.00
June 2, 2010 (trial testimony prep and trial) ⁴⁸	\$2,088.00
June 9, 2010 (trial travel costs; air, hotel, car, changes) ⁴⁹	\$525.08
Brian Alm	
Jan. 29, 2010 (related to his Feb. 9, 2010 depo) ⁵⁰	\$1.89
Julia Kale	
Mar. 19, 2010 (related to her Mar. 1, 2010 depo) ⁵¹	\$591.86
May 19, 2010 (related to her May 19, 2010 trial depo) ⁵²	\$297.52
Steve Bonanno	
May 27, 2010 (related to trial testimony prep and trial) ⁵³	\$783.34
<u>Total</u>	<u>\$6,307.69</u>

f. Hearing transcripts

In light of the Court's multiple rulings on the scope of the matter for trial, the scope of plaintiff's expert's testimony in conjunction therewith, and the Court's entertaining of multiple reconsideration motions by the plaintiff on the Court's summary judgment order, Hartford took the step of securing transcripts of a number of the hearings, to maintain an accurate record of the Court's and parties' prior conferences on various matters as a future need might arise for review

⁴⁶ Counsel Aff., Exh. B, p. 5; Exh. D. Although denoted only as "deposition preparation," this amount includes deposition attendance time, as well. This amount reflects a subtraction of the \$20.00 claimed as a cost-by-right, *supra*.

⁴⁷ *Id.*, at p. 6; Exh. D.

⁴⁸ Copley Aff., Exh. B; Counsel Aff., Exh. D. This amount reflects a subtraction of the \$20.00 claimed as a cost-by-right for witness appearance.

⁴⁹ Counsel Aff., Exh. B, p. 7; Exh. D. This amount reflects a subtraction of the \$95.40 claimed as a cost-by-right for witness travel, *supra*.

⁵⁰ *Id.* at p. 5; Exh. C. This amount reflects a subtraction of the \$20.00 claimed as a cost-by-right, *supra*.

⁵¹ *Id.* at p. 6; Exh. E. This amount reflects a subtraction of the \$20.00 claimed as a cost-by-right, *supra*.

⁵² *Id.* This amount reflects a subtraction of the \$20.00 claimed as a cost-by-right, *supra*.

⁵³ Copley Aff., Exh. A. This amount reflects a subtraction of the \$20.00 claimed as a cost-by-right for witness appearance and the \$7.80 claimed as a cost-by-right for witness travel, *supra*.

of those prior discussions. *See, e.g.*, Order Granting Defendant's Motion to Compel and Order Granting Defendant's Summary Judgment in Part and Denying Summary Judgment in Part, filed Nov. 23, 2009, at p.1 ("BASED UPON written motions and argument thereon, and for the reasons as stated on the record at the time of the hearing held on November 4, 2009....")(emphasis added); Defendant's Motion in Limine Re: Plaintiff's Witness List and Memorandum in Support, filed May 17, 2010, at p. 3 (quoting January 13, 2010 hearing transcript); Hartford's Opposition to Plaintiff's Fourth Motion for Reconsideration, filed April 12, 2010, at pp. 16-17 (quoting March 9, 2010 hearing transcript and March 24, 2010 hearing transcript). As such, Hartford should be awarded, in the interests of justice, the following hearing transcript costs as reasonable and necessary discretionary costs, which were exceptional in light of plaintiff's multiple filings:

Transcript of November 4, 2009 hearing ⁵⁴	\$299.00
Transcript of January 13, 2010 hearing ⁵⁵	\$194.65
Transcript of Mar. 9, 2010 hearing ⁵⁶	\$135.00
Transcript of Mar. 24, 2010 hearing ⁵⁷	\$237.60
<u>Total</u>	<u>\$866.25</u>

g. Travel costs for trial, depositions, hearings & inventory

Travel costs in this matter were exceptional for three key reasons: first, plaintiff proceeded to trial on what was no more than a \$19,052 claim, despite Hartford's prior Rule 68 offer of \$100,000; second, a number of key witnesses were not in the Coeur d'Alene area, including plaintiff's expert (Spokane, Washington), Amy Kohler (Bothell, Washington,

⁵⁴ Counsel Aff., Exh. B, at p. 5; Exh. L.

⁵⁵ *Id.*; Exh. L.

⁵⁶ *Id.* at p. 6; Exh. L.

⁵⁷ *Id.*; Exh. L.

deposition noticed by plaintiff), Julia Kale (Charlotte, North Carolina, deposition noticed by plaintiff), Melanie Copley (Charlotte, North Carolina, deposition noticed by plaintiff), Michelle Reynolds (Charlotte, North Carolina, deposition noticed by plaintiff); and, third, because of plaintiff's dilatory conduct in conducting a physical inventory of surviving business personal property – which would have, and should have, occurred prior to suit with salvor costs borne by Hartford – Hartford had to conduct such in a litigation context, requiring attendance by counsel.

Moreover, given that Lakeland failed to prevail either on summary judgment or at trial, especially in the face of a Rule 68 offer and the fact that litigation was commenced (September 4, 2008) before the conclusion of the determined Period of Restoration (October 31, 2008), this litigation could have been avoided had Lakeland provided claim information as requested by Hartford, rather than taking its dispute into the court system. Thus, an award of discretionary costs even for travel related to plaintiff's depositions, mediation, and the summary judgment hearing should be awarded as discretionary costs.

Accordingly, Hartford claims the following necessary and reasonable travel costs as discretionary costs in this matter, which should be awarded in the interests of justice:

Inventory inspection & count

Bryan Nickels ("BAN"), December 18, 2008 (airfare, parking) ⁵⁸	\$295.75
Keely Duke ("KED") & BAN, Jan. 21-23, 2009 (air, auto, lodging, meals, parking, fuel) ⁵⁹	\$1,557.36
BAN, Mar.30-Apr. 1, 2009 (air, auto, lodging, meals, parking) ⁶⁰	\$840.80

Mediation

KED, June 24-26, 2009 (air, auto, lodging, meals, parking) ⁶¹	\$1,472.46
--	------------

⁵⁸ Counsel Aff., Exh. B, at p. 4; Exh. M.

⁵⁹ *Id.*; Exh. M. This travel also incorporated the depositions of Mike and Kathy Fritz, taken Jan. 22-23, 2009.

⁶⁰ *Id.*; Exh. M.

⁶¹ *Id.*; Exh. N.

Amy Kohler deposition and preparation - noticed by plaintiff

BAN, Sept. 17, 2009 (air, auto, parking)⁶² \$535.43

BAN, Sept. 21, 2009 (air, auto, parking)⁶³ \$612.59

Summary judgment hearing

KED, Nov. 3-4, 2009 (air)⁶⁴ \$290.20

KED, Nov. 3-4, 2009 (lodging, auto, meals, fuel, parking)⁶⁵ \$328.64

Plaintiff's Motion to Reconsider hearing

KED, Jan. 12-13, 2010 (air)⁶⁶ \$292.80

KED, Jan. 12-13, 2010 (lodging, auto, meals, fuel, parking)⁶⁷ \$322.02

Plaintiff's Expert Dan Harper deposition

BAN, Feb. 1, 2010 (air)⁶⁸ \$144.70

KED, Feb. 1, 2010 (air)⁶⁹ \$144.70

BAN, Feb. 1-2, 2010 (lodging, baggage fee, parking)⁷⁰ \$247.72

KED, Feb. 1-2, 2010 (lodging, meals, auto, parking)⁷¹ \$446.71

BAN, Feb. 2, 2010 (return air)⁷² \$155.40

KED, Feb 2, 2010 (return air)⁷³ \$155.40

Brian Alm deposition

⁶² *Id.*; Exh. O.

⁶³ *Id.*; Exh. O.

⁶⁴ *Id.*; Exh. P.

⁶⁵ *Id.*; Exh. P.

⁶⁶ *Id.* at p. 5; Exh. Q.

⁶⁷ *Id.*; Exh. Q.

⁶⁸ *Id.*; Exh. R.

⁶⁹ *Id.*; Exh. R.

⁷⁰ *Id.*; Exh. R.

⁷¹ *Id.*; Exh. R.

⁷² *Id.*; Exh. R.

⁷³ *Id.*; Exh. R.

BAN, Feb. 9, 2010 (air)⁷⁴ \$289.40

BAN, Feb. 9, 2010 (auto, parking)⁷⁵ \$158.49

Hearing on various motions, including plaintiff's Motion to Amend and second Motion for Reconsideration

KED, Feb. 21-22, 2010 (air)⁷⁶ \$289.40

KED, Feb. 21-22, 2010 (lodging, meals, auto, parking)⁷⁷ \$218.67

Julia Kale, Michelle Reynolds, and Melanie Copley depositions and preparation – noticed by plaintiff

KED, Feb. 27-Mar. 1, 2010 (air)⁷⁸ \$630.30

KED, Feb. 27-Mar. 1, 2010 (lodging, meals, taxi, parking, room)⁷⁹ \$868.57

Trial preparation and attendance

BAN, Mar. 5, 2010, Amy Kohler trial prep (air, auto, parking)⁸⁰ \$403.10

KED/BAN, Mar. 24, 2010, trial prep working lunch⁸¹ \$24.03

KED, May 18-20, 2010, Julia Kale trial depo & prep (air)⁸² \$724.30

KED, May 18-20, 2010, Julia Kale trial depo & prep
(lodging, meals, taxi, phone)⁸³ \$841.59

BAN, May 20, 2010, S. Bonanno trial prep (air, auto, parking)⁸⁴ \$368.63

KED, May 23, 2010, trial (air)⁸⁵ \$147.70

BAN, May 23-29, 2010, trial (lodging, mileage)⁸⁶ \$1,119.32

⁷⁴ *Id.*; Exh. S.

⁷⁵ *Id.*; Exh. S.

⁷⁶ *Id.* at p. 6; Exh. T.

⁷⁷ *Id.*; Exh. T.

⁷⁸ *Id.*; Exh. U.

⁷⁹ *Id.*; Exh. U.

⁸⁰ *Id.*; Exh. V.

⁸¹ Counsel Aff., Exh. B, at p. 6.

⁸² *Id.*; Exh. V.

⁸³ *Id.*; Exh. V.

⁸⁴ *Id.*; Exh. V.

⁸⁵ *Id.* at p. 7; Exh. V.

⁸⁶ *Id.*; Exh. V. Mileage was incurred, in lieu of airfare, to avoid the cost of shipping trial materials, including the clerk's original and judge's copy sets of exhibits, which were instead transported by car.

KED, May 23-29, 2010, trial (lodging, meals, auto, fuel) ⁸⁷	\$2,569.35
KED, May 29, 2010, trial (return air) ⁸⁸	\$147.70
<u>Total</u>	<u>\$16,643.23</u>

h. Travel costs incurred by Hartford's representative.

In addition to the attendance at mediation and trial by Hartford's counsel, Hartford's representative – Melanie Copley – also attended both the mediation and trial of this matter, which necessitated travel from Charlotte, North Carolina to do so. Given Hartford's exceptional efforts to have an in-person representative at the time of mediation, and need to have a live company representative at the time of trial – which could have been avoided, in light of the nature of the claims by plaintiff and Hartford's Rule 68 offer – Hartford should also be awarded these necessary and reasonable items as discretionary costs in this action, in the interests of justice:

Mediation ⁸⁹	\$1,307.53
Ticket Change Fee for Trial ⁹⁰	\$276.00
Ticket for Trial ⁹¹	\$1,195.31
Ticket Change Fee for Trial ⁹²	\$150.00
Trial Expenses ⁹³	\$695.31
Trial Expenses ⁹⁴	\$536.95
<u>Total</u>	<u>\$4,161.10</u>

⁸⁷ *Id.*; Exh. V.

⁸⁸ *Id.*; Exh. V.

⁸⁹ Copley Aff., Exh. D.

⁹⁰ Copley Aff., Exh. E. This change was necessitated by the vacating and resetting of trial dates.

⁹¹ Copley Aff., Exh. E.

⁹² Copley Aff., Exh. E. This change was necessitated by the vacating and resetting of trial dates.

⁹³ Copley Aff., Exh. F.

⁹⁴ Copley Aff., Exh. G.

i. Summary and total of claimed discretionary costs.

As outlined above, Hartford claims the following discretionary costs:

a) Expert fees and related costs	\$30,216.65
b) Trial exhibits not admitted	\$560.00
c) Copying, messengers, etc.	\$10,073.59
d) Mediation costs	\$3,298.06
e) Additional witness costs	\$6,307.69
f) Hearing transcripts	\$866.25
g) Travel costs	\$16,643.23
h) Hartford expenses	\$4,161.10
<u>Total</u>	<u>\$72,126.57</u>

TOTAL CLAIMED DISCRETIONARY COSTS: **\$72,126.57**

CONCLUSION

For the reasons set forth herein, Hartford respectfully requests that pursuant to 54(d)(1) of the Idaho Rules of Civil Procedures that the Court grant Hartford its requested costs as follows:

a. Costs as a Matter of Right -- **\$15,256.08**

b. Discretionary Costs -- **\$72,126.57**

Total: **\$87,382.65**

In light of the recent conclusion of trial, and ongoing efforts to tabulate, in full, the claimed costs in this action, Hartford reserves the right to amend and/or otherwise supplement this Verified Memorandum of Costs.

RESPECTFULLY SUBMITTED this 10th day of June, 2010.

HALL, FARLEY, OBERRECHT &
BLANTON, P.A.

By: 

Keely E. Duke – Of the Firm
Bryan A. Nickels – Of the Firm
Attorneys for Defendant

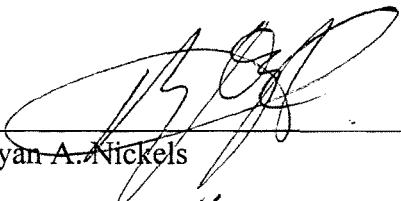
VERIFICATION

STATE OF IDAHO)
 : ss.
County of Ada)

I, **Bryan A. Nickels**, being first duly sworn upon oath, depose and say:

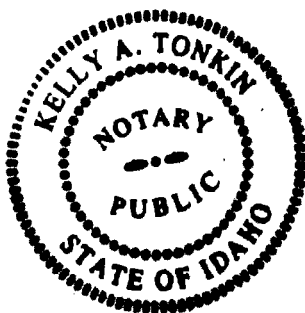
I am one of the attorneys representing defendant Hartford Fire Insurance Company in the above-entitled action and, as such, I have knowledge of the cost amounts itemized in the foregoing Verified Memorandum of Costs.

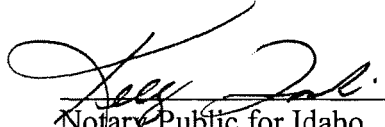
I have reviewed the foregoing Verified Memorandum of Costs. To the best of my knowledge and belief, the costs incurred herein are true and correct and were reasonably and necessarily incurred in the defense of this action. To the best of my knowledge and belief, the costs incurred herein are in compliance with Rule 54(d) of the Idaho Rules of Civil Procedure.



Bryan A. Nickels

SUBSCRIBED AND SWORN to before me this 10th day of June, 2010.





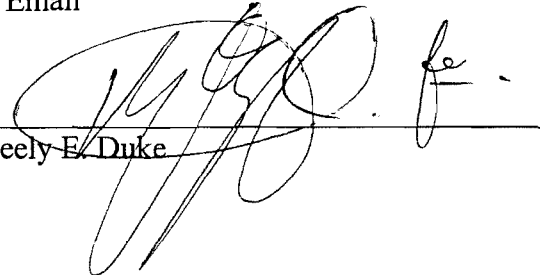
Notary Public for Idaho
Commission expires 3/30/12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of June, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur M. Bistline
Law Offices of Arthur M. Bistline
1423 N. Government Way
Coeur d'Alene, Idaho 83814
Fax: 208/665-7290

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☒ Overnight Mail
- ☐ Telecopy
- ☐ Email



Keely E. Duke

Keely E. Duke
ISB #6044; ked@hallfarley.com
Bryan A. Nickels
ISB #6432; ban@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
Telephone: (208) 395-8500
Facsimile: (208) 395-8585
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Attorneys for Defendant

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

2010 JUN 11 PM 3:58

CLERK DISTRICT COURT
DEPUTY
Barb Crum

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE,
L.L.C.,

Plaintiff,

vs.

THE HARTFORD FIRE INSURANCE
COMPANY, a Connecticut corporation,

Defendant.

Case No. CV-08-7069

**DEFENDANT'S MOTION FOR AWARD
OF COSTS**

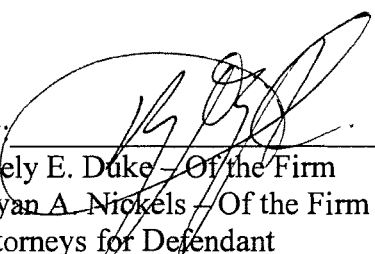
COMES NOW defendant Hartford Fire Insurance Company ("Hartford"), by and through its counsel of record, Hall, Farley, Oberrecht & Blanton P.A., and respectfully moves this Court to award costs pursuant to Idaho Rules of Civil Procedure 54(d)(1) and 68.

This motion is based on defendant Defendant's Verified Memorandum of Costs, the Affidavit of Counsel in Support of Verified Memorandum of Costs, and the Affidavit of Melanie Copley in Support of Verified Memorandum of Costs, filed contemporaneously herewith.

ORAL ARGUMENT IS REQUESTED.

DATED this 10th day of June, 2010.

HALL, FARLEY, OBERRECHT &
BLANTON, P.A.

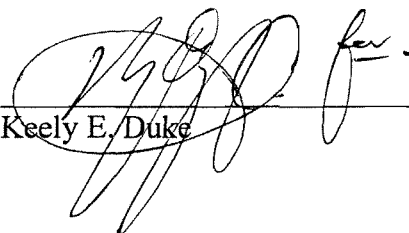
By: 
Keely E. Duke - Of the Firm
Bryan A. Nickels - Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of June, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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Law Offices of Arthur M. Bistline
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- ☐ U.S. Mail, Postage Prepaid
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- ☒ Overnight Mail
- ☐ Telecopy
- ☐ Email


Keely E. Duke

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 5-11-10
AT 5:00 O'CLOCK P.M.
CLERK, DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE,
L.L.C.,

Plaintiff,

vs.

THE HARTFORD FIRE INSURANCE
COMPANY, a Connecticut corporation,

Defendant.

Case No. CV-08-7069

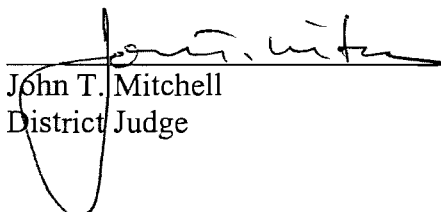
**ORDER RE: DEFENDANT'S MOTION IN
LIMINE RE: CLAIMED DELAY**

BASED UPON Defendant's Motion in Limine Re: Claimed Delay, filed May 19, 2010, argument thereon at the hearing of May 20, 2010, and stipulation by the parties based upon oral modification of the motion by defendant Hartford,

IT IS HEREBY ORDERED that Defendant's Motion in Limine Re: Claimed Delay is hereby GRANTED in part. Evidence and testimony relating to any claims activity or payments after October 31, 2008 will not be presented at the time of trial by either party.

IT IS SO ORDERED.

DATED this 11 day of June, 2010.


John T. Mitchell
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of June, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur M. Bistline
Law Offices of Arthur M. Bistline
1423 N. Government Way
Coeur d'Alene, Idaho 83814

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☒ Telecopy 665-7290

Keely E. Duke
HALL, FARLEY, OBERRECHT &
BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☒ Telecopy 208-395-8585



Clerk of the Court

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED: 6-11-10

AT 5:00 O'CLOCK P.M.
CLERK, DISTRICT COURT
Michael Carson
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE,
L.L.C.,

Plaintiff,

vs.

THE HARTFORD FIRE INSURANCE
COMPANY, a Connecticut corporation,

Defendant.

Case No. CV-08-7069

**ORDER RE: DEFENDANT'S MOTION IN
LIMINE RE: PLAINTIFF'S WITNESS
LIST**

BASED UPON Defendant's Motion in Limine Re: Plaintiff's Witness List, filed May 17,
2010, argument thereon at the hearing of May 20, 2010, and stipulation by the parties,

IT IS HEREBY ORDERED that Defendant's Motion in Limine Re: Plaintiff's Witness
List is hereby GRANTED in all respects.

IT IS SO ORDERED.

DATED this 11th day of June, 2010.

John T. Mitchell

John T. Mitchell
District Judge

CLERK'S CERTIFICATE OF SERVICE

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BLANTON, P.A.
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☐ Hand Delivered
☐ Overnight Mail
☒ Telecopy 208-395-8585



Clerk of the Court

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }

FILED: 5-11-10
AT 5:00 O'CLOCK P.M.
CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE,
L.L.C.,

Plaintiff,

vs.

THE HARTFORD FIRE INSURANCE
COMPANY, a Connecticut corporation,

Defendant.

Case No. CV-08-7069

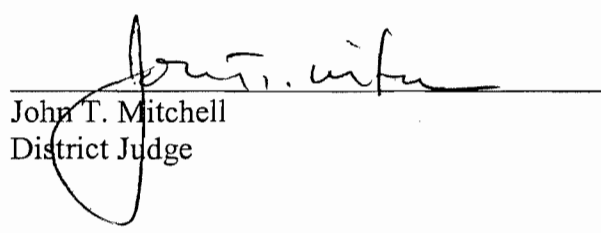
**ORDER RE: DEFENDANT'S MOTION IN
LIMINE RE: PLAINTIFF'S EXHIBIT
LIST**

BASED UPON Defendant's Motion in Limine Re: Plaintiff's Exhibit List, filed May 17,
2010, argument thereon at the hearing of May 20, 2010, and stipulation by the parties,

IT IS HEREBY ORDERED that Defendant's Motion in Limine Re: Plaintiff's Exhibit
List is hereby GRANTED in all respects.

IT IS SO ORDERED.

DATED this 11th day of June, 2010.


John T. Mitchell
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of June, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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Boise, Idaho 83701

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☒ Telecopy 208-395-8585


Clerk of the Court

ARTHUR M. BISTLINE
 BISTLINE LAW, PLLC
 1423 N Government Way
 Coeur d'Alene, ID 83814
 (208) 665-7270
 (208) 665-7290 (fax)
abistline@povn.com
 ISB: 5216

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED:
 #124 VS
 2010 JUN 28 PM 2:03

CLERK DISTRICT COURT
 Linda Shedd
 DEPUTY VS

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE,
 L.L.C.,

Plaintiff,

vs.

THE HARTFORD FIRE INSURANCE
 COMPANY, a Connecticut Corporation,

Defendant.

Case No: CV-08-7069

PLAINTIFF'S SWORN OBJECTION TO
 DEFENDANT'S MEMORANDUM OF
 COSTS

Hartford is not entitled to discretionary costs

A court may evaluate whether costs are exceptional within the context of the nature of the case." *City of McCall v. Seubert*, 142 Idaho 580, 588-89, 130 P.3d 1118, 1126-27 (2006). The claim discretionary costs incurred in this action are standard and customary costs associated with insurance bad faith litigations and this Court should decline to award Hartford any discretionary costs.

In Idaho, in order for a cost to be considered "exceptional," the costs must be a cost not normally associated with the particular type of case. "The trial court concluded: 'This is the very 'nature' of these sorts of cases. Similarly, travel and lodging expenses for expert witnesses and attorneys and photocopy expenses are not exceptional but, on the contrary, are common 'in a

case of this nature.' " This demonstrates the trial court's understanding of the meaning of "exceptional" as contained in I.R.C.P. 54(d)(1)(D)" *Fish v. Smith* 131 Idaho 492, 494, 960 P.2d 175, 177 (1998). Hartford has advanced no argument why any of these discretionary costs are "exceptional" for an insurance bad faith case. The costs are exactly the type of costs which are reasonably and necessarily incurred in this type of case and are not "exceptional". Furthermore, there was nothing unusually complex, as in *Great Plains Equipment Inc. v. Northwest Pipeline Corp*, 136 Idaho 466, 36 P.3rd 218 (2001), cited by Hartford, and Hartford has not argued otherwise.

Hartford argues that the nature of the case was "exceptional" because it was a dispute over only \$19,052. This dispute was over much more than \$19,052 before this Court dismissed the bad faith claims. Furthermore, Plaintiffs offered to waive the \$19,052 in order to avoid the trial expense and allow this matter to proceed to appeal. Defendant declined that offer.

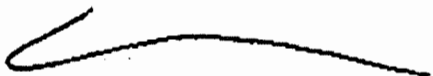
Hartford also argues that the experts and attorneys were scattered in various locations. All of Lakeland's experts and attorneys were located in the Spokane/Coeur d Alene area. Hartford chose to employ counsel from Boise and adjusters on the east coast and Lakeland should not be required to bear that expense for Hartford's choices.

Hartford has advanced no argument explaining how either this case was unusually complex or how the costs incurred were costs that are exceptional to this litigation. Nor has Hartford explained how in the interest of justice, Hartford should be awarded such discretionary costs. Hartford should not be awarded its discretionary costs.

VERIFICATION

I, Arthur M. Bistline, have verified that the above Objection to Defendant's Memorandum on Costs is true and correct to the best of my knowledge.

Submitted this 20th day of June, 2010.



ARTHUR M. BISTLINE
Attorney for Plaintiff

SUBSCRIBED AND SWORN to before me this 20th day of June 2010.



Rebecca Klahs
NOTARY PUBLIC in and for Idaho
Residing at: Sandpoint
Commission Expires: 12/14/2011

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2010, I served a true and correct copy of the foregoing PLAINTIFF'S OBJECTIONS TO DEFENDANT'S MEMORANDUM OF COSTS by the method indicated below, and addressed to the following:

Keely E. Duke
Bryan A. Nickels
Hall, Farley, Oberrecht & Blanton, P.A.
P.O. Box 1271
Boise, ID 83701

☐ US Mail
☐ Overnight Mail
☐ Hand Delivered
☒ Facsimile (208) 395-8585
☐ Email

By: 

Arthur M. Bistline

ARTHUR M. BISTLINE
BISTLINE LAW, PLLC
1423 N Government Way
Coeur d'Alene, ID 83814
(208) 665-7270
(208) 665-7290 (fax)
abistline@povn.com
ISB: 5216

FILED
30057
2010 JUL -9 PM 4:26

CLERK DISTRICT COURT
[Signature]
DEPUTY

Attorney for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE,
L.L.C.,

Plaintiff,

vs.

THE HARTFORD FIRE INSURANCE
COMPANY, a Connecticut Corporation,
Defendant.

Case No: CV-08-7069

NOTICE OF APPEAL

Plaintiff/Appellant, Lakeland True Value Hardware, L.L.C., appeals from the First
Judicial District, the Honorable John T. Mitchell presiding.

I. Judgments and Orders Appealed

- A. The Order dismissing Plaintiff's Bad Faith cause of action, and the subsequent
denials of motion to reconsider that ruling.
- B. The Order holding that consequential damages cannot be recovered under the
relevant policy.
- C. The verdict of the jury.

II. Issues on Appeal

- A. Did the Trial Court error by considering and ruling on Plaintiff's bad faith
claim based on delay in payment in light of the fact that the delay claim was
not raised.

- B. Did the Trial Court error in holding that the insurance contract excluded recovery for consequential damages?
- C. Did the Trial Court error in allowing Defendant's agent to testify to interpretations of the contract which were inconsistent with the plain language of the contract?
- D. Did the Trial Court error in including a mitigation instruction in the jury instructions?
- E. Did the Trial Court error in allowing evidence of the cause of the delay in payment of the claim at trial?
- F. Does the evidence support the verdict?

III. Statement of Jurisdiction

- A. The matter is a final and appealable pursuant to Idaho Appellate Rule 11(a)(1).

IV. The transcripts of all matters taken down by the Court Reporter in this matter are requested.

V. A standard record is requested, and all proposed jury instructions are requested.

VI. Certification of Attorney

- A. Service of the Notice of Appeal has been served on the Court reporter.
- B. The estimated fees for the reporter's transcript has been paid.
- C. All appellate filing fees have been paid.
- D. Service of this Notice of Appeal has been filed on all parties.

DATED this 9th day of July, 2010.




ARTHUR M. BISTLINE

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2010, I served a true and correct copy of the foregoing NOTICE OF APPEAL by the method indicated below, and addressed to the following:

Keely E. Duke	<input type="checkbox"/> US Mail
Bryan A. Nickels	<input type="checkbox"/> Overnight Mail
Hall, Farley, Oberrecht & Blanton, P.A.	<input type="checkbox"/> Hand Delivered
P.O. Box 1271	<input checked="" type="checkbox"/> Facsimile (208) 395-8585
Boise, ID 83701	<input type="checkbox"/> Email

Julie Folland	<input type="checkbox"/> US Mail
Court Reporter for Judge Mitchell	<input type="checkbox"/> Overnight Mail
	<input checked="" type="checkbox"/> Hand Delivered
	<input type="checkbox"/> Facsimile
	<input type="checkbox"/> Email



LEANNE M. VILLA

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED: 7/15/10
AT 3:15 O'CLOCK P.M.
CLERK DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE,
L.L.C.,

Plaintiff,

vs.

THE HARTFORD FIRE INSURANCE
COMPANY, a Connecticut corporation,

Defendant.

Case No. CV-08-7069

JUDGMENT

THE ABOVE-ENTITLED MATTER came before the Court for trial by jury on May 25, 2010, and continued through May 28, 2010. Based upon the Special Verdict returned by the jury on May 28, 2010, the Court now enters the following Judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff Lakeland True Value Hardware, LLC takes nothing on its claims against defendant The Hartford Fire Insurance Company, that those claims are dismissed with prejudice, and that judgment be entered in favor of defendant The Hartford Fire Insurance Company.

IT IS FURTHER ORDERED that this Court reserves for future determination its ruling on Defendant's Verified Memorandum of Costs, which was timely filed on June 11, 2010.

DATED this 15th day of July, 2010.

John T. Mitchell
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of July, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur M. Bistline
Law Offices of Arthur M. Bistline
1423 N. Government Way
Coeur d'Alene, Idaho 83814

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Telecopy 665-7290

Keely E. Duke
HALL, FARLEY, OBERRECHT &
BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Telecopy 208-395-8585



Clerk of the Court

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 8/27/10
AT 3:20 O'CLOCK P.M.
CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE,
L.L.C.,

Plaintiff,

vs.

THE HARTFORD FIRE INSURANCE
COMPANY, a Connecticut corporation,

Defendant.

Case No. CV-08-7069

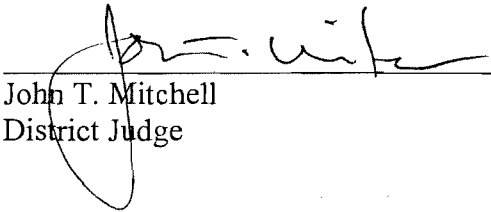
AMENDED JUDGMENT

THE ABOVE-ENTITLED MATTER came before the Court for trial by jury on May 25, 2010, and continued through May 28, 2010. Based upon the Special Verdict returned by the jury on May 28, 2010, the Court now enters the following Judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff Lakeland True Value Hardware, LLC takes nothing on its claims against defendant The Hartford Fire Insurance Company, that those claims are dismissed with prejudice, and that judgment be entered in favor of defendant The Hartford Fire Insurance Company.

IT IS FURTHER ORDERED that, consistent with the hearing held on August 25, 2010 and related Order Re: Defendant's Motion for Award of Costs filed thereafter, defendant The Harford Fire Insurance Company is awarded costs in the amount of \$71,830.77.

DATED this 27th day of August, 2010.


John T. Mitchell
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of August, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur M. Bistline
Law Offices of Arthur M. Bistline
1423 N. Government Way
Coeur d'Alene, Idaho 83814

- ☐ U.S. Mail, Postage Prepaid
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Keely E. Duke
HALL, FARLEY, OBERRECHT &
BLANTON, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701

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- ☐ Hand Delivered
- ☐ Overnight Mail
- ☒ Telecopy 208-395-8585



Clerk of the Court

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 8/27/10
AT 3:30 O'CLOCK P.M.
CLERK, DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE,
L.L.C.,

Plaintiff,

vs.

THE HARTFORD FIRE INSURANCE
COMPANY, a Connecticut corporation,

Defendant.

Case No. CV-08-7069

**ORDER RE: DEFENDANT'S MOTION
FOR AWARD OF COSTS**

BASED UPON written motion and argument thereon, and for the reasons as stated on the record at the time of the hearing held on August 25, 2010, and

BASED UPON this Court's exercise of discretion in the awarding of costs and its finding that Defendant The Hartford Fire Insurance Company is the prevailing party on all aspects of this litigation, and

BASED UPON this Court's finding that Defendant The Hartford Fire Insurance Company's requested costs as a matter of right were reasonably and necessarily incurred, and

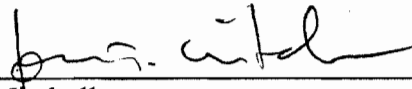
BASED UPON this Court's finding that particular portions of Defendant The Hartford Fire Insurance Company's requested discretionary costs, as identified in the hearing held on August 25, 2010, were necessary, reasonable, exceptional, and in the interests of justice should be awarded to Defendant The Hartford Fire Insurance Company,

IT IS HEREBY ORDERED that Defendant's Motion for Award of Costs is granted in part and denied in part. Defendant is awarded \$15,256.08 for its requested costs as a matter of

right, and is awarded \$56,574.69 for its requested discretionary costs, for a total cost award of \$71,830.77.

IT IS SO ORDERED.

DATED this 27th day of August, 2010.



John T. Mitchell
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of August, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur M. Bistline
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- ☒ Telecopy 208-395-8585


Clerk of the Court

ARTHUR M. BISTLINE
BISTLINE LAW, PLLC
1423 N Government Way
Coeur d'Alene, ID 83814
(208) 665-7270
(208) 665-7290 (fax)
abistline@povn.com
ISB: 5216

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED
JSS
293

2010 SEP -7 PM 3:52

CLERK DISTRICT COURT
Finley K. Cleveland
DEPUTY

Attorney for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE,
L.L.C.,

Plaintiff,

vs.

THE HARTFORD FIRE INSURANCE
COMPANY, a Connecticut Corporation,
Defendant.

Case No: CV08-7069

NOTICE OF AMENDED APPEAL

Plaintiff/Appellant, Lakeland True Value Hardware, L.L.C., appeals from the First
Judicial District, the Honorable John T. Mitchell presiding.

I. Judgments and Orders Appealed

- A. The Order dismissing Plaintiff's Bad Faith cause of action filed 11-23-2009,
by the Honorable John T. Mitchell, and the Oral pronouncement thereof
placed on the record on 11-4-10.
- B. The Memorandum Decision and Order Re: Hartford's Motions in Limine,
filed 3-8-10, by the Honorable John T. Mitchell.
- C. The Special Verdict of the jury filed 5-28-10.
- D. The final Judgment, Order or Decree Entered 7-15-10 by the Honorable John
T. Mitchell.
- E. The Order re Defendant's Motion for Award of Costs filed 8-27-10 by the
Honorable John T. Mitchell.

II. Issues on Appeal

1. Did the Trial Court error by considering and ruling on Plaintiff's bad faith claim based on delay in payment in light of the fact that the delay claim was not raised.
2. Did the Trial Court error by dismissing Plaintiff's bad faith claims?
3. Did the Trial Court error in holding that the insurance contract excluded recovery for consequential damages?
4. Did the Trial Court error in allowing Defendant's agent to testify to interpretations of the contract which were inconsistent with the plain language of the contract?
5. Did the Trial Court error in including a mitigation instruction in the jury instructions?
6. Did the Trial Court error in allowing evidence of the cause of the delay in payment of the claim at trial?
7. Does the evidence support the verdict?
8. Did the Trial Court error in awarding discretionary costs?

III. Statement of Jurisdiction

1. The matter is a final and appealable pursuant to Idaho Appellate Rule 11(a)(1).

IV. The following transcripts are requested:

- A. Motion for Summary Judgment hearing held on 11-4-09;
- B. Motions argued on 5-25-10.

V. A standard Clerk Record is requested together with the following:

1. Hartford's Motion for Summary Judgment, dated 8-20-09;

2. Statement of undisputed Facts in Support of Hartford's Motion for Summary Judgment, dated 8-20-09;
3. Memorandum in Support of Hartford's Motion for Summary Judgment, dated 8-20-09;
4. Affidavit of Melanie Copley in Support of Hartford's Motion for Summary Judgment, dated 8-20-09;
5. Affidavit of Counsel in Support of Hartford's Motion for Summary Judgment, dated 8-20-09;
6. Stipulation to Seal Affidavit of counsel in Support of Hartford's Motion for Summary Judgment and Affidavit of Melanie Copley in Support of Hartford's Motion for Summary Judgment, dated 8-21-09;
7. Order RE: Stipulation to Seal Affidavit of counsel in Support of Hartford's Motion for Summary Judgment and Affidavit of Melanie Copley in Support of Hartford's Motion for Summary Judgment; dated 8-26-09;
8. Memorandum in Response to Summary Judgment, dated 9-4-09;
9. Memorandum in Response to Summary Judgment, dated 10-21-09;
10. Amended Memorandum in Response to Summary Judgment, dated 10-22-09;
11. Affidavit of Mike Fritz, dated 10-22-09;
12. Amended Affidavit of Mike Fritz, dated 10-22-09;
13. Affidavit of Arthur M. Bistline in Support of Motion for Relief from Pretrial Order, dated 11-16-09;
14. Memorandum in Support of Motion for Relief from Pretrial Order, dated 11-16-09;

15. Order Granting Defendant's Motion to Compel and Order Granting Defendant's Summary Judgment in Part and denying Summary Judgment in Part, dated 11-13-09;
16. Reply in Support of Hartford's Memorandum of Fees, dated 12-11-09;
17. Memorandum in Support of Motion for Reconsideration, dated 12-16-09;
18. Affidavit of Arthur M. Bistline in Support of Motion to Reconsider, dated 12-16-09;
19. Hartford's Opposition to Plaintiff's Motion for Reconsideration, dated 1-6-10;
20. Plaintiff's Response to Motion to Strike Experts, dated 1-6-10;
21. Plaintiff's Response to Motion to Strike Regarding Discovery Responses., dated 1-6-10;
22. Affidavit of Arthur M. Bistline in Response to Defendant's Motion to Strike, dated 1-6-10;
23. Reply in Support of Motion for Protective Order, dated 1-11-10;
24. Reply in Support of Hartford's Motion to Strike Plaintiff's Experts, dated 1-11-10;
25. Reply in Support of Defendant's Motion to Strike Re: Damages or in the Alternative Second Motion to Compel, and Request for Fees and Costs, dated 1-11-10;
26. Plaintiff's Objection to Consideration of Matters Not Raised on Summary Judgment by Hartford in Response to Motion to Reconsider, dated 1-12-10;
27. Order Granting in Part and Denying in Part Defendant's Motion to Strike Plaintiff's Experts and Memorandum in Support, dated 1-25-10;

28. Affidavit of Dan Harper in Support of Motion to Reconsider, dated 2-4-10;
29. Plaintiff's Second Motion for Reconsideration, dated 2-4-10;
30. Plaintiff's Second Supplemental expert Witness Disclosure, dated 2-4-10;
31. Plaintiff's Memorandum in Support of Second Motion to Reconsider, dated 2-4-10;
32. Memorandum in Support of Defendant's Motion in Limine RE: Damages, dated 2-9-10;
33. Plaintiff's Response to Defendant's Motion in Limine Concerning Dan Harper, dated 2-16-10;
34. Memorandum in Opposition to Motion for Protective Order, dated 2-16-10;
35. Reply in Support of Defendant's Motion in Limine Re: Expert Dan Harper, dated 2-18-10;
36. Reply in Support of Motion for Protective Order, dated 2-18-10;
37. Reply in Support of Defendant's Motion in Limine in RE: Damages, dated 2-18-10;
38. Amended Notice of Hearing Re: Defendant's Motion to Strike Re: Damages or in the Alternative Second Motion to Compel, and Request for Fees and Costs, dated 2-22-10;
39. Order Denying Plaintiff's Second Motion for Reconsideration, dated 2-26-10;
40. Order Denying Defendant's Motion for Protective Order, dated 2-26-10;
41. Order Granting defendant's Motion to Strike Affidavit of Robert E. Underdown, dated 2-26-10;

42. Order Denying Plaintiff's Motion to Amend Complaint, dated 2-26-10;
43. Affidavit of Dan Harper in Support of Motion to Consolidate, dated 3-5-10;
44. Memorandum in Support of Motion to Consolidate, dated 3-5-10;
45. Affidavit of Arthur M. Bistline in Support of Motion to Consolidate, dated 3-5-10;
46. Memorandum Decision and Order RE: Hartford's Motions in Limine, dated 3-8-10;
47. Motion to Consolidate, dated 3-8-10;
48. Motion to Reconsider, dated 3-9-10;
49. Affidavit of Arthur M. Bistline in Support of Motion to Continue, dated 3-19-10;
50. Affidavit of Dan Harper, dated 3-19-10;
51. Plaintiff's Motion to Continue Trial, dated 3-19-10;
52. Defendant's Memorandum in Opposition to Plaintiff's Motion to Continue Trial, dated 3-22-10;
53. Motion to Reconsider (Amended), dated 4-6-10;
54. Plaintiff's Memorandum in Support of Motion to Reconsider Dismissal of Plaintiff's Bad Faith Claims, dated 4-6-10;
55. Amended Motion to Consolidated, dated 4-6-10;
56. Affidavit of Dan Harper in Support of Motion to Consolidated, dated 4-6-10;
57. Memorandum in Support of Motion to Consolidate, dated 4-6-10;
58. Hartford's Opposition to Plaintiff's Fourth Motion for Reconsideration, dated 4-14-10;

59. Reply to Objection to Motion to Reconsider, dated 4-26-10;
60. Defendant's Motion in Limine Re: Plaintiff's Exhibit List and Memorandum in Support, dated 5-17-10;
61. Memorandum Decision and Order Re: Lakeland True Value Hardware's Motion to Reconsider and Motion to Consolidate, dated 5-17-10;
62. Second Affidavit of Dan Harper in Opposition to Motion for Summary Judgment, dated 5-20-10;
63. Defendant's Motion in Limine Re Paid Claim Amounts and Memorandum in Support, dated 5-20-10;
64. Affidavit of Arthur M. Bistline in Opposition of Motion in Limine Redelay in Payment, dated 5-20-10;
65. Defendant's Motion in Limine RE Claimed Delay and Memorandum in Support, dated 5-20-10;
66. Plaintiff's Special Verdict, dated 5-27-10;
67. Special Verdict, dated 5-28-10;
68. Affidavit of Melanie Copley in Support of Defendants Verified Memorandum of Costs, dated 6-11-10;
69. Affidavit of Counsel in Support of Defendants Verified Memorandum of Costs, dated 6-11-10;
70. Defendants Verified Memorandum of Costs; dated 6-11-10;
71. Defendants Motion for Award of Costs, dated 6-11-10;
72. Order re Defendants Motion in Limine RE claimed Delay, dated 6-11-10;
73. Order re Defendants Motion in Limine RE Plaintiff's Witness List, dated 6-11-10;
74. Order re Defendants Motion in Limine RE Exhibit List, dated 6-11-10;

75. Plaintiffs Sworn Objection to Defendant's Memorandum of Costs, dated 6-11-10; and

76. Amended Judgment, dated 8-27-10.

77. Question from Jury to Court filed by the Court on May 28th, 2010.

VI. Certification of Attorney

1. Service of the Notice of Amended Appeal has been served on the Court reporter.
2. The estimated fees for the reporter's transcript has been paid.
3. All appellate filing fees have been paid.
4. This Notice of Amended Appeal has been served on all parties.

DATED this 7th day of September, 2010.


ARTHUR M. BISTLINE

CERTIFICATE OF SERVICE


I hereby certify that on the 7th day of August, 2010, I served a true and correct copy of the foregoing NOTICE OF AMENDED APPEAL by the method indicated below, and addressed to the following:

Keely E. Duke
Bryan A. Nickels
Hall, Farley, Oberrecht & Blanton, P.A.
P.O. Box 1271
Boise, ID 83701

☐ US Mail
☐ Overnight Mail
☐ Hand Delivered
☒ Facsimile (208) 395-8585
☐ Email

Julie Folland
Court Reporter for Judge Mitchell
PO Box 9000
Coeur d'Alene, ID 83816-9000
Fax: 446-1188

☐ US Mail
☐ Overnight Mail
☐ Hand Delivered
☒ Facsimile
☐ Email


JENNIFER JENKINS

RECEIVED

MAY 28 2010

Your honor —

JOHN T. MITCHELL

In reference to question #1
we want to know the actual language
of the policy in regard to "was Labeland
capable" or "should have been capable"
to resume some of its operations by
November 1, 2008?

Thank you

Kenneth C. M.
Foreman

Answered w/a new special verdict form.

IN THE SUPREME COURT OF THE
STATE OF IDAHO

LAKELAND TRUE VALUE HARDWARE,)
L.L.C.,)
)
Plaintiffs/Appellants,)
)
v.)
)
THE HARTFORD FIRE INSURANCE)
COMPANY, a Connecticut Corporation)
)
Defendants/Respondents .)
_____)

CERTIFICATE OF
EXHIBITS

CASE # CV08-7069

SUPREME COURT NO.
37987-2010

I, DANIEL J. ENGLISH, Clerk Of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the attached list of exhibits is a true and accurate copy of the exhibits being forward to the Supreme Court of Appeals.

I FURTHER CERTIFY that the following documents will be submitted as exhibits to the Record:

- 1A Courts Exhibts-Depo-Mike Fritz 1/22/09
- 1B. Courts Exhibts-Depo-Depo-Mike Fritz 1/23/09
- 2. Courts Exhibts-Depo-Depo-Michele Reynolds & CD
- 3. Courts Exhibts-Depo-Depo-Brian Alm
- 4. Courts Exhibts-Depo-Depo-Julia Kale & CD
- 5. Courts Exhibts-Depo-Depo-Dan Haper & CD
- 6. Plaintiff's Exhibits 39-42-Documents
- 7. Defendant's Exhibits 1001-1008-Documents
- 8. Defendant's Exhibits 1013-Documents
- 9. Defendant's Exhibits 1014-Documents
- 10. Defendant's Exhibits 1018-Documents
- 11. Defendant's Exhibits 1026A-1028-Documents
- 12. Defendant's Exhibits 1030-Documents
- 13. Defendant's Exhibits 1032-Documents
- 14. Defendant's Exhibits 1034-1036-Documents
- 15. Defendant's Exhibits 1038-Documents
- 16. Defendant's Exhibits 1041-1043-Documents
- 17. Defendant's Exhibits 1047-1048-Documents
- 18. Defendant's Exhibits 1050-1057-Documents
- 19. Defendant's Exhibits 1061-1063-Documents
- 20. Defendant's Exhibits 1065-1070-Documents

21. Defendant's Exhibits 1073-Documents
22. Defendant's Exhibits 1075-1076-Documents
23. Defendant's Exhibits 1079-1080-Documents
24. Defendant's Exhibits 1101-Documents
25. Defendant's Exhibits 1104-Documents
26. Defendant's Exhibits 1126-1129-Documents

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court
At Kootenai County, Idaho this 29 day of December, 2010.

DANIEL J. ENGLISH
Clerk of the District Court

By: Debra D. Leu
Deputy Clerk

IN THE SUPREME COURT OF THE
STATE OF IDAHO

LAKELAND TRUE VALUE HARDWARE,)
L.L.C.,)
)
Plaintiffs/Appellants,)
)
v.)
)
THE HARTFORD FIRE INSURANCE)
COMPANY, a Connecticut Corporation)
)
Defendants/Respondents.)
_____)

SUPREME COURT NO
37987-2010

Attorney for Appellant

Arthur M. Bistline
1423 N Government Way
Coeur d'Alene, ID 83814

Attorneys for Respondents

Keely E. Duke
Bryan A. Nickles
PO Box 1271
Boise, ID 83701

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at
Kootenai, Idaho this 29 day of December, 2010

DANIEL J. ENGLISH
Clerk of the District Court

By: Debra D. Leu
Deputy Clerk

THE SUPREME COURT OF THE

STATE OF IDAHO

LAKELAND TRUE VALUE HARDWARE,
L.L.C.,

Plaintiffs/Appellants,

v.

THE HARTFORD FIRE INSURANCE
COMPANY, a Connecticut Corporation

Defendants/Respondents .

SUPREME COURT NO
37987-2010

CLERK'S CERTIFICATE

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I certify that the Attorneys for the Appellants and Respondents were notified that the Clerk's Record and Reporter's Transcript were complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid, on the 24 day of December, 2010.

I do further certify that the Clerk's Record and Reporter's Transcript will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 29 day of December, 2010.

DANIEL J. ENGLISH

Clerk of District Court

By: Debra D. Lew
Deputy Clerk